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CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1981

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on October 22, 1981, rehearing denied February 24, 1982.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Case No. 52,272, is reported as Elledge v. State, 408 So.2d 1021 (Fla. 1982) and is set out in pages 1a-4a in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on October 22, 1981, and petitioner's timely motion for rehearing was denied by order dated February 24, 1982 (5a). On April 14, 1982 Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including May 25, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Where the Florida Supreme Court distinguished Estelle v. Williams, 425 U.S. 501 (1976) and approved the shackling of petitioner in irons in his capital sentencing jury trial on the reasoning that petitioner was no longer presumed innocent were petitioner's rights violated as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments?

2. Whether, in this pre-Lockett capital penalty trial, the sentencing judge improperly restricted consideration of mitigating factors in imposing the death sentence upon petitioner in contravention of the Eighth and Fourteenth Amendments?

3. Whether in imposing the death sentence the reliance upon evidence to support an aggravating factor that had been invalidated as lacking an essential element of proof in a prior appeal of this cause violated the double jeopardy principles of Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852 (1981).

4. Whether under the Eighth and Fourteenth Amendments a capital defendant may be precluded from presenting expert testimony, regarding the application of capital punishment, to the jury in his capital penalty trial?

5. Whether the automatic rule for determing harmless error in capital sentencing adopted by the Supreme Court of Florida violates the Eighth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This cause also involves Section 921.141, Florida Statutes (1973) entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length the statute is set out in its entirety on pages 6a-7a of the Appendix hereto.

STATEMENT OF THE CASE

Petitioner was indicted for first degree murder and rape on January 9, 1975. He entered pleas of guilty to both offenses on March 17, 1975. After penalty trial resulting in the jury's death sentence verdict, petitioner was sentenced to death. On direct appeal the Supreme Court of Florida affirmed petitioner's conviction but reversed the death sentence and ordered that a new sentencing trial be held. Elledge v. State, 346 So.2d 998 (Fla. 1977).

A new capital penalty trial was held in August, 1977. The jury returned a verdict recommending the death sentence and the trial judge immediately sentenced petitioner to death.

At the penalty trial, the prosecution presented witnesses concerning the offense and relating to prior convictions of petitioner. Petitioner testified in his own behalf. The case involves the death of Margaret Strack occurring in petitioner's room during an alleged rape. The decedent had voluntarily accompanied petitioner from a bar to his room where they smoked marijuana. She undressed and sexually teased petitioner, but then refused to engage in intercourse. Petitioner then became upset and allegedly forceably engaged in sexual intercourse with her during which he choked her, resulting in her death.

The decedent's body was discovered on the morning of August 25, 1974. The officer testified the body contained bruises, the ankles were bound, and the body was partially unclothed. The pathologist, who performed an autopsy testified that there was evidence of sexual intercourse within several hours of death and that the decedent had a blood alcohol level of .06 percent. He opined that the cause of death was asphyxia, due to strangulation consistent with the use of hands and that it was quite possible that some of the injuries could have been caused by the moving of the body after death. A bartender testified that she served drinks to petitioner around 3:00 P.M. and that a woman later identified as the decedent sat down next to petitioner and they ordered drinks. Thereafter, the two amicably left together in a sober condition. A transcript and tape recording of a statement made by petitioner were admitted into evidence and the tape recording was played before the jury.

Mrs. Katherine Nelson, the widow of Paul D. Nelson, testified that in the early morning on August 26, 1974, petitioner came to their small motel and requested a room. She said that after he entered the office, petitioner pulled out a gun and told her to go to the back room, where he then told her to tie her husband with an electrical cord. Petitioner then bound Mrs. Nelson and demanded money. After Petitioner found the money according to the witness, he became angey because he thought there was more.

Petitioner then discovered Mrs. Nelson's grandson in another bedroom attempting to load a rifle, and he disarmed the boy and brought him into the bedroom and tied him to her husband. Mrs. Nelson explained that she had gotten loose and found their gun but that her husband had told her not to move because the gun was not loaded. Her husband then worked his way loose and ran out into the hall with the empty gun. The witness heard shots and saw petitioner reach around into the bedroom and fire several more shots. (T 284-286).

The State then rested.

Petitioner, who was twenty-four at the time of the offense, testified in his own behalf. He told of his life and family background. His parents, who were migrant farmworkers, followed the crops and he never had a permanent home. Petitioner's father never had time, because of his work, to spend with petitioner. During his childhood, his parents had poor understanding of petitioner and generally lacked concern for his upbringing. They would constantly argue and his mother would take it out on the children by beating them with irons, skillets, pans, etc. Finally, when he was twelve years old, petitioner could no longer tolerate the abuse he was receiving and so he ran away from home in order to find a place where he could be treated normally. He described the trouble and consequent boys' schools he had experienced in his early years, and his severe drinking problem which resulted from having regularly consumed alcohol since he was eleven years old. Similarly, petitioner had early on sought drugs as an escape from his problems. Additionally, petitioner related his previous arrests and resulting psychiatric examinations and treatment and that alcohol, drugs, and his temper exacerbated his problems.

Petitioner stated he and his girlfriend came to Florida so he could see her family in Hollywood. Petitioner indicated he got a job but he was still drinking and using drugs. After arguing with his girlfriend, they split up, and petitioner drank heavily because of the frustration.

Petitioner went on to explain that he had met the decedent

at a bar, and that after several drinks they went to his room where they smoked the marijuana, the deceased sexually teased him and, having been sexually aroused, petitioner forced the decedent to engage in intercourse with him. During his act, petitioner choked the deceased, confirming the statement he had given to the police.

Petitioner stated that he shot Mr. Nelson because Mr. Nelson had come at him with a gun, and that he had since been sentenced to life imprisonment for that offense. Petitioner indicated he told the police everything because he wanted to get professional help to try to understand how he could have done these things. Explaining that he knows he belongs in prison, petitioner stated he had begun writing in the hopes of preventing other young children from ending up as he did. Finally, petitioner expressed deep remorse(at having killed Ms. Strack and Mr. Nelson) and stated he wanted to live and that he expected to spend the rest of his life in prison.

Petitioner was sentenced to death and that sentence was affirmed by the Supreme Court of Florida.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

1. Shackling petitioner in the capital penalty trial. The Supreme Court of Florida in the present case has approved a broad rule which effectly would allow all defendants to be shackled before the jury in capital penalty trials. The Florida Court approved of shackling in capital penalty trials on the reasoning that defendants in such proceedings no longer are presumed innocent.

The federal constitutional issue presented is thus whether this Court's decision in Estelle v. Williams, 425 U.S. 501 (1976) applies to the penalty trial of a capital case; that is, does the fact that a defendant has already been found guilty distinguish the rationale of Estelle v. Williams, supra so as to allow a defendant in a bifurcated capital penalty trial to be shackled in irons without procedural due process safeguards.

The present case is appropriate for review on certiorari because it involves a serious constitutional question not previously addressed by this Court and likely to arise again under the lower court's broad holding; it was decided by the lower court in a manner that conflicts with and misapplies principles announced by this Court in previous decisions; and the issue is squarely drawn.

Prior to the commencement of the capital penalty trial in this case, the trial judge stated that "in an abundance of precaution" he was going to require petitioner to remain shackled in leg irons during the proceedings. As a reason, the judge said that he had "received information" from the chief of detention that the chief had "received information" from two lieutenants who had heard from someone that petitioner might attack a bailiff (T 11). Neither the chief, the lieutenants, or any other sources were brought forward to testify or in any other manner substantiate this bare triple hearsay allegation. Defense counsel objected to requiring petitioner to appear before the jury shackled in leg irons. Petitioner specifically requested to be heard regarding those allegations but the judge summarily denied him the opportunity

to do so (T 11). Petitioner was thus put to trial for his life shackled at all times before the jury in the capital penalty trial.

This federal question was raised on direct appeal to the Supreme Court of Florida. That Court distinguished the rationale of Estelle v. Williams, supra, on the reasoning that petitioner had already been convicted. The Florida Supreme Court held that the principle of Estelle v. Williams, supra did not apply to a capital penalty trial: "Cases which concern such prejudice [from requiring a defendant to appear in shackles] deal with adverse effects that such restraints have upon the accused's presumption of innocence .... [b]ut appellant did not stand before the sentencing jury as an innocent man." (emphasis supplied) (2a).

The Florida Supreme Court's reasoning constitutes an incorrect and overly restrictive reading of Williams and ignores the unique situation created by shackling a defendant in a capital sentencing trial. Moreover, the lower court's approval of the shackling of petitioner where he was refused his requested opportunity to be heard on the question demonstrates that the Florida Supreme Court's holding recognizes no limitations on the shackling of a defendant in a capital penalty trial.

The reasoning of the Florida Supreme Court that since petitioner no longer had a "presumption of innocence," there was no error in his appearing shackled, misreads Estelle v. Williams, supra. While Williams involved the "presumption of innocence" because it involved the guilt/innocence trial, it was grounded in the fundamental right to a fair trial. 425 U.S. at 503. The right to a fair trial applies equally to a capital penalty trial. See Gardner v. Florida, 430 U.S. 349, 358 (1977); cf. Green v. Georgia, 442 U.S. 95, 97 (1979). In Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852 (1981) this Court recognized that the capital penalty trial "resembles and is like a trial on the issue of guilt or innocence and explicitly requires the jury to determine whether the prosecution has 'proved its case'." 101 S.Ct. at 1861. The "probability of deleterious effects

on fundamental rights" (Estelle v. Williams, supra, 425 U.S. at 504) is equally as great in the capital penalty trial. The evil of shackling a defendant before the jury in a capital penalty trial, just as having him appear in prison clothing in the guilt/innocence trial, is "so likely to be a continuing influence throughout the trial that ... an unacceptable risk is presented of impermissible factors coming into play." Id. at 505. As this Court expressly recognized in Illinois v. Allen, 397 U.S. 337, 344 (1970): "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant ...."

"The impermissible factors" involve more than the "presumption of innocence" as held by the lower court. In a capital penalty trial, requiring petitioner to appear before the jury in shackles is uniquely prejudicial because it impermissibly conveys a message to the jury on specific factors relevant to its sentencing decision. Its effect was to shift the burden of proof to petitioner in the same manner that the forced appearance in shackles or prison garb destroys the presumption of innocence in a criminal trial on guilt. The use of physical restraints before the jury unfairly created a presumption that petitioner was dangerous and thereby shifted to him the burden of proving that death was not a proper punishment. Shackling vividly conveys to the jury that the defendant is an escape risk and thus not appropriate for imprisonment because of the continuing risk he would pose. It is common knowledge that jurors are exceptionally responsive to physicial variations among defendants and that negative subliminal factors and inferences increase in proportion to the defendant's unattractiveness. Claven and Zeisel, The American Jury, 193, 217 (1966).

The effect of the shackling was to inject into the capital sentencing determination, impermissible factors, creating a "substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 427 (1980). Considering the "unique need" for reliability and the constitutional requirement of "clear and objective standards" that provide "specific and detailed guidance" to adequately channel sentencing discretion in capital sentencing,

the distinction relied upon by the Florida Supreme Court to approve shackling a defendant in a capital penalty trial was erroneous.

Of further importance in this case is the fact that the trial judge refused petitioner's specific request to be heard regarding the shackling. The judge, as justification for shackling petitioner, relied upon some triple hearsay allegations, Petitioner specifically requested the opportunity to be heard in response to those hearsay claims but that request was summarily denied. In Illinois v. Allen, 397 U.S. 337 (1970) this Court faced the situation of the shackling and gagging of a contumacious defendant. This Court upheld the practice in narrow situations but it was emphasized that "no person should be tried while shackled and gagged except as a last resort."(emphasis supplied) Id. at 344. As a procedure to be employed only as a "last resort," shackling a defendant involves trangression of the fundamental right to a fair trial. Denying a defendant the opportunity to be heard on a matter so gravely prejudicial to his fundamental right, itself denies procedural due process of law. It results in a wholly unreliable determination on a question important to the defendant. There thus must be some showing that shackling is necessary as a "last resort." As in the present case, that showing is not accomplished where the defendant is refused the opportunity to be heard. By approving the shackling of petitioner where he was refused the opportunity to be heard, the Florida Supreme Court demonstrates the broad nature of its holding, sanctioning the shackling of a capital defendant regardless of the circumstances.

Accordingly, this Court should grant certiorari in the present case to review the significant constitutional question of whether the principles announced by this Court in Estelle v. Williams, supra apply to capital sentencing trials. The present case is appropriate for resolution of this question since it is squarely presented, the Florida Supreme Court misapplied the principles of Williams and thereby has effectively sanctioned shackling all defendants in capital sentencing trials, and becsuse

it involves the application of the ultimate penalty and is likely to arise again with relative frequency under the broad holding of the lower court.

2. Consideration of mitigating circumstances was precluded by operation of law.

The holding by the Florida Supreme Court in the present case that consideration of mitigating factors was not limited as a matter of law, conflicts with the principles announced by this Court in Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982) and with the decision of the Fifth Circuit of Appeals in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, ___U.S.___, 50 U.S.L.W. 3854 (April 26, 1982).

The capital penalty trial in the present case took place a year before this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978). The penalty trial thus took place during a period of ambiguity in Florida law regarding the propriety of consideration of nonenumerated mitigating factors. In 1976, the year before this trial, the Florida Supreme Court announced its decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976) which appeared to limit, as a matter of law, the consideration of mitigating factors to only those expressly set out in the statute: "... the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriatness of a death penalty ... and we are not free to expand the list." (emphasis supplied) Id. at 1139. It was not until 1978, after this Court's Lockett decision, that the Florida Supreme Court clarified or altered its holding in Cooper. See Songer v. State, 365 So.2d 696 (Fla. 1978) (opinion on rehearing).

Accordingly during the time in which the present penalty trial took place, there was ambiguity as to whether nonstatutory mitigating factors could be considered. Petitioner suffered from the ambiguity because, although he presented evidence of nonenumerated factors in mitigation,[1] the trial judge was of the belief that he could not consider them as a matter of law. At the outset of

[1] Evidence of nonstatutory mitigating factors presented in this case included petitioner's early life where he suffered physical and mental abuse from his parents, his parents' problems with alcohol which led to petitioner's history of alcohol problems

the penalty proceedings in this case, the trial judge expressed his view that consideration of mitigating factors was limited by law to the statute: "... didn't the Supreme Court tell me that I had to stick just to the statutory circumstances?" (T 6). The prosecutor espoused the same view to the jury in his opening statement: "Ladies and gentlemen, as I said, we are limited by the aggravating circumstances. Of course, Mr. McCain, the defense lawyer, is limited by the mitigating circumstances." (emphasis supplied) (T 203). In his sentencing order, the judge reviewed only statutory mitigating circumstances and concluded that "no mitigating circumstances exist" which confirms his belief that consideration of mitigating circumstances was restricted to the statute. Moreover, it is not necessary to speculate at all on whether the sentencing judge in the present case deemed consideration of mitigating factors limited as a matter of law. In a case tried before the same judge during the same post-Cooper pre-Lockett period of ambiguity as the present case, it was found that the judge held the erroneous view that the law restrict consideration of mitigating factors. In reversing a death sentence because of a jury life recommendation, the Florida Supreme Court found that the same trial judge as in the present case "held the mistaken belief that the could not consider nonstatutory mitigating circumstances." Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). Thus because of the ambiguity in the law during the period of this trial, the judge "followed the law he believed it was being interpreted at the time of trial," Perry v. State, 395 So.2d 170, 174 (Fla. 1981), with the result that consideration of nonenumerated mitigating factors was precluded as a matter of law.

Footnote 1/ continued:

since the age of eleven and his long history of drug abuse, the debilitating effects of his rootless early environment, petitioner's sincere efforts to reform, his good conduct in prison, his cooperation with the police, petitioner's voluntary receipt of psychiatric counselling, his sincere remorse, and the unique circumstances of the offense that began with the sexual teasing by the deceased and the evidence that this led to petitioner in effect emotionally short-circuiting. Each of these factors was relevant to petitioner's "character and record and to circumstances of the offense" (Lockett v. Ohio, supra 438 U.S. at 605), but could not be considered because they did not fall within the narrow statutory mitigating circumstances.

An additional aspect of the limitation on consideration of nonstatutory mitigating factors involves the instruction to the jury in the penalty trial. The holding of the Florida Supreme Court on this question in the present case directly conflcits with the decision of the Court of Appeals in Washington v. Watkins, supra, and involves a significant federal constitutional question involving the procedures for imposing the death sentence. It is thus appropriate for this Court's review on certiorari.

In the case-at-bar the jury was instructed on aggravated circumstances as follows:

> "The aggravating circumstances, which you may consider, are limited to such of the following, which may be established by the evidence: ..."

(T 387). And as to mitigating circumstances, the jury was charged:

> "The mitigating circumstances which you may consider, if established by the evidence, are these: ..."

(emphasis supplied) (T 389). Only statutory mitigating circumstances were listed. Additionally, prior to the sentencing trial, the judge instructed the jury that it would be charged "on the factors in aggravation and mitigation that you may consider." (T 198).

On direct appeal the Florida Supreme Court "flatly rejected" the claim that these instructions limited the consideration of mitigating factors (4a). The holding in the present case directly conflicts with the Court of Appeal's decision in Washington v. Watkins, supra. Under circumstances strikingly similar to those of the present case, the Fifth Circuit held that the jury charge unconstitutionally limited the consideration of nonenumerated mitigating factors. The jury instruction in Washington, was almost identical to that of the present case. On aggravating circumstances, the jury was charged:

> "Now consider only the following elements of aggravation in determinining whether the death penalty should be imposed:..."

655 F.2d at 1367. Two aggravating factors were then listed. As to the mitigating circumstances the jury in Washington was instructed:

> "Now consider the following elements of mitigation in determining whether the death

penalty should not be imposed: ..."

Id. Two mitigating factors were then listed.

About the instruction on mitigating circumstances, the Court of Appeals held that: "a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating and mitigating -- were the sole factors that he was permitted to consider in the discharge of his oath." Id. at 1370. The Court of Appeals concluded that the jury instruction "prevented the sentencer's consideration of nonstatutory mitigating factors in essentially the same manner as did the Ohio statute struck down by the Lockett court." Id. at 1373. The Court of Appeals thus found error of "constitutional proportions that violated rights secured ... under the Eighth and Fourteenth Amendments" which "so infected the sentencing proceedings as to drain them of fundamental fairness." Id. at 1376.

The same error of constitutional proportion obtains in the present case. This case is appropriate for review by this Court because of the direct conflict of the decision below with the decision of the Fifth Circuit Court of Appeals, and involves an important constitutional issue that is likely to arise again.

The circumstances at work in the present case -- the ambiguity in the law, the trial judge's mistaken belief that he could not consider nonstatutory mitigating factors, and the charge to the jury that limited its consideration of mitigating factors -- combined to unconstitutionally preclude the consideration of non-enumerated factors as a matter of law. In Eddings v. Oklahoma, supra, this Court recognized that: "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence." ___U.S. at ___, 102 S.Ct. at 875-876. The law operated in the present case to preclude the consideration of relevant, albiet nonstatutory, mitigating factors.

For the reason that this case involves the post-Cooper, pre-Lockett period of ambiguity; for the reason that the trial judge in the case-at-bar thus held the mistaken view that he could only consider statutory mitigating factors; and for the reason that the lower court's decision regarding the jury instruction is

in direct conflict with a decision of the federal court of Appeals, review on certiorari by this Court is appropriate to resolve the conflict and the ambiguity.

As stated by Justice O'Connor, concurring in Eddings:

> "In any event, we may not speculate as to whether the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances ... Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court."

(emphasis supplied) ___U.S. at ___, 102 S.Ct. at 878. The ambiguity is legitimate and apparent in the case-at-bar and should be removed by this Court.

3. Double Jeopardy after appellate reversal of an aggravating circumstance.

This case presents the issue of whether this Court's decision in Bullington v. Missouri, ___U.S. ___, 101 S.Ct. 1852 (1981) regarding the application of the prohibition against double jeopardy in capital sentencing applies to a particular aggravating circumstance. In the present case an aggravating circumstance was found invalid in the first appeal of this cause because an essential element of proof was found lacking. In the retrial on the capital penalty, however, the prosecution sought to present and did present, over objection, evidence of the same aggravating circumstance. That aggravating factor was approved on appeal because the Supreme Court found that the previously omitted element had been proven in the retrial. The question is thus whether the reliance upon that previously invalidated aggravating factor in the retrial violated the guarantee against twice being placed in jeopardy. This case is thus appropriate for review as it presents the opportunity for further clarification of Bullington and presents a significant constitutional issue that is likely to arise again with relative frequency.

In the first appeal of this cause, the Florida Supreme Court invalidated the evidence and finding of a prior alleged homicide by the trial court. The finding had been urged by the prosecution and relied upon by the sentencing judge to support the statutory aggravating circumstance of a prior conviction for

a felony involving violence, Fla. Stat. §921.141 (5) (b) (1973). The Florida Supreme Court invalidated that finding because the evidence had failed to establish that there had been a conviction for that offense which under Florida law is an essential element of that aggravating circumstance. Elledge v. State, 346 So.2d 998 (Fla. 1977) (hereinafter cited as Elledge I). Since the evidence was insufficient to establish an aggravating circumstance, it was held to be improper to admit it. It follows that if there had been sufficient evidence presented in the first penalty trial (i.e. proof of a conviction), then the Florida Supreme Court would not have reversed on that ground. Accordingly, the basis for the Florida Supreme Court's decision in Elledge I was the insufficiency of the evidence to establish the §(5)(b) aggravating circumstance.

To allow the prosecution to attempt to prove that aggravating circumstance after a reversal of the cause based upon the insufficiency of the evidence that it had presented in the first trial, violates the prohibition against being twice placed in jeopardy. The prosecution failed to carry its burden of proof on that aggravating factor in the first penalty trial and double jeopardy bars the prosecution for again "trying" petitioner for the same conduct to establish the same aggravating factor. Petitioner was truly acquitted of that conduct in the first penalty trial by the reversal in Elledge I, and could not be retried again for it. Aggravating circumstances in Florida are each separate crimes which must be proven beyond a reasonable doubt. E.g. State v. Dixon, 283 So.2d 1 (Fla. 1973). The state failed in its attempt to prove that "crime" in the first trial and should have been barred from trying again.

The prohibition against double jeopardy applies to the capital sentencing proceedings of this cause. Distinguishing "normal" sentencing procedures where there is wide discretion, no rules or standards and no burden of proof, this Court held in Bullington v. Missouri, supra, that the double jeopardy bar applies to capital sentencing that "resembles and is like a trial on the issue of guilt or innocence and explicitly requires the jury to determine whether the prosecution has 'proved'

its case." ___U.S. at ___, 101 S.Ct. at 1861. Florida capital sentencing procedures of course include specific guidelines and require the prosecution to prove aggravating circumstances beyond a reasonable doubt. Thus, the bar against double jeopardy fully applies to Florida capital sentencing. In Bullington, this Court held that the prosecution was prohibited by the double jeopardy bar from seeking the death penalty in the retrial(on either the same or different aggravating factors) after reversal of the conviction because the prosecution had failed to carry its burden in the first penalty trial which had resulted in a life sentence.

The principle of Bullington should apply to the situation presented by the case-at-bar. In the present case the prosecution offered evidence in the first penalty trial to prove an aggravating circumstance. That evidence was considered by the jury and found and weighed as an aggravating circumstance by the trial judge. The Florida Supreme Court ruled that that evidence, lacking in an essential element, was insufficient to prove the §921.141 (5) (b) aggravating circumstance and thus was improper. As stated in Bullington: "Having received 'one fair opportunity to offer whatever proof it could assemble'... the State is not entitled to another." 101 S.Ct. at 1862. Accordingly, unlike a normal sentencing procedure, capital sentencing procedures do not simply start over with a clean slate; this is due to the burden of proof and the strict guidelines required for such sentencing; as found in Bullington.

> "... the 'clean slate' rational ... is inapplicable whenever a jury agrees or an appelalte court decides that the prosecution has not proved its case."

101 S.Ct. at 1860.

The Florida Supreme Court's prior decision in this case "represent[ed] a resolution... of some or all of the factual elements of the offense [viz.: §(5) (b) aggravating circumstance] charged." Burks v. United States, 437 U.S. 1, 10 (1978). And by deciding that the prosecution "had failed to come forward with sufficient proof," id., the lower court clearly held that the aggravating circumstance "had not been established." Id. It is settled that:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the

> prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."

Id. at 11.

Accordingly, the evidence regarding the other offense, lacking in proof of an essential element to prove the §(5)(b) aggravating circumstance, should have been precluded (or not offered by the State) in the first trial because of the insufficiency of the evidence. And double jeopardy bars the State from being given another opportunity to supply additional evidence.

The question was presented to the Supreme Court of Florida by trial objections, in briefs on direct appeal and by motion for rehearing. Relying upon the prosecutor's argument in the trial court (although no proof was adduced), the Florida Supreme Court approved the evidence and finding in the retrial because of an apparent ensuing conviction for the previous offense:

> "[T]he entire thrust of our prior decision was the distinction between felony convictions which were allowable to prove the corresponding aggravating factor, and a charge for such crime which was not allowable.... We are at a loss to understand how appellant could claim that evidence of the [other]... murder is forever barred despite an ensuing conviction in light of the reasoning in Elledge I."

(emphasis by the court) (2a).

The decision of the Florida Supreme Court was thus based upon the reasoning that the prosecution had supplied the essential element in the retrial that it had failed to prove in the first penalty trial. Upon this reasoning the Supreme Court of Florida approved the introduction and reliance upon that evidence to prove the §(5)(b) aggravating factor. However, that reasoning is misplaced since the double jeopardy bar does not depend upon whether the prosecution can "prove" its case the second time; rather the concern is that the prosecution received one opportunity to offer whatever proof it could assemble and that is not entitled to another.

Accordingly, the present case involves a question of the application of Bullington v. Missouri, supra to a particular aggravating circumstance. This Court should grant certiorari in order to consider the important issue regarding the administration of the death penalty.

4. The jury was precluded from hearing evidence concerning the application of the death penalty.

Certiorari review is appropriate in this case because it presents an important question of apparent first impression regarding the administration of capital sentencing. Is it consistent with the Eighth and Fourteenth Amendments to preclude a defendant in a capital sentencing trial before a jury from presenting expert testimony regarding the application and effect of the death penalty?

The question arose in this case by petitioner's motion for continuance of the penalty trial along with his notice of prospective witnesses and a motion for authorization of expenses. The additional witnesses proffered by petitioner in his notice included: Dr. Hugo Adam Bedeau, Ph.D; Dr. Hans Zeisel, Ph.D.; Dr. William J. Bowers, Ph.D; Don Reid and Clinton Duffy. Drs. Bedeau, Zeisel, and Bowers each have done extensive research and have authored numerous books and articles on the question of capital punishment, including its deterrant effect, discriminatory application and other aspects of the use of capital punishment. Each are recognized experts in the field. See, e.g. Gregg v. Georgia, 428 U.S. 153, 184 n. 31 (1976). Likewise, Mr. Duffy, former San Quentin warden has long been involved in studying the question of capital punishment. See, e.g., Furman v. Georgia, 408 U.S. 238, 287 n. 35 (1972).

Petitioner sought the continuance of the penalty trial in order to secure the attendance of these witnesses since they were not available during the week of the trial due to their participation in another trial out of state. Defense counsel sought to proffer their testimony as best he could considering that he was not able to have the witnesses present for the proffer:

> "Mr. McCain: What we are talking about, I think, is that it is clearly admissible in terms of what the death sentence does, in terms of its relation to society, as to whether it is of any benefit at all.
>
> For example, there are studies which indicate, in states which impose death sentences, that the homicide rate increases, not decreases.
>
> If the jury is intent upon attempting

to stop the crime rate, they ought to have that kind of information.

Another piece of information which, I think, would be valuable for the jury would be the fact that, if, in terms of just economics, that it costs more money to impose a death penalty and electrocution, than it does to keep them in jail for life.

There are, then, witnesses which would testify as to the sociological effects of it; not necessarily directed toward a particular defendant, but toward society as a whole.

Basically, that is a thumbnail sketch. There are many other aspects of it, but those are the generalities that these witnesses would testify to; and I would proffer and represent to the Court that, generally, this is the area in which they would testify to."

The trial judge denied the motion for continuance of the penalty trial on the grounds that the witnesses and evidence that petitioner sought to present would be inadmissible:

"The Court: I don't really feel that that type of testimony would be admissible in this proceeding. It is up to the Legislature to decide if we are going to have a death penalty in Florida, and they have decided that we are.

Even if they would propose the testimony, I think I would preclude them from testifying as far as their opinion as to the advisability of the death penalty."

Accordingly petitioner was precluded, as a matter of law, from presenting expert testimony regarding aspects of the application of the death penalty. The issue was presented on direct appeal to the Supreme Court of Florida where petitioner challenged the denial of his motion for continuance. The Florida Supreme Court's opinion does not discuss the question directly except to note that it passed upon the question: "... appellant attacks his second death sentence on sundry grounds, all of which we have considered, but only five of which warrant discussion" (2a) and "we are unable to discern any error that may have deprived appellant of any protections offered by the judicial process." (4a). However, in another decision the Florida Supreme Court indicated its reasons for holding such testimony to be inadmissible in capital sentencing. In Shriner v. State, 386 So.2d 525, 533 (Fla. 1980) the defendant had attempted to present the testimony of a priest who had witnessed an execution. The reasoning of the Supreme Court of Florida in finding no error in the exclusion of that testimony was that it

did not relate to mitigating factors and thus was not "relevant to the sentencing inquiry." Id.

The error in the Florida Supreme Court's reasoning is in overlooking the particular role of juries in the administration of capital punishment. The role of a jury in capital sentencing is "to maintain a link between contemporary community values and the penal system" that reflects the "evolving standards of decency that mark the progress of a maturing society." Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968). See also Gregg v. Georgia, supra, 428 U.S. at 182, 190. Jury determinations are one of the two "crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," and determining the validity of capital sentencing statutes involves that contemporary standards of decency be ascertained. Woodson v. North Carolina, supra, 428 U.S. at 295. Jury sentencing is intended to place "the real direction of society in the hands of the governed ... and not in ... the government." Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 5 (1966).

Thus, the jury's role is not so limited as the Supreme Court of Florida would hold. The "link" provided between "contemporary community values and the penal system" is important to the continued constitutionality of capital punishment. That function, so often referred to and relied upon by this and other courts, cannot be properly carried out if the jury is left uninformed. Contemporary standards of decency could never "evolve" if juries are left ignorant of the facts pertinent to the utilization of the ultimate punishment. Petitioner here did not attempt to present emotional evidence that would serve to distract the jury's consideration. Rather, he sought to present recognized experts to testify as to the results of statistical and other sociological research regarding the application of capital punishment. Such information is essential if the jury is to truly carry out its function maintaining the link between the penal system and contemporary human values.

The question presented in this case is appropriate for

review on certiorari because it involves a question of importance in the administration of capital punishment in the United States.

5. The automatic harmless error rule.

It was in the initial appeal of this cause that the Supreme Court of Florida first announced its automatic rule for determining whether an error is harmless in capital sentencing proceedings. In Elledge v. State, 346 So.2d 998 (Fla. 1977) (hereinafter Elledge I), the Florida Supreme Court reviewed two footnotes in Proffitt v. Florida, 428 U.S. 242 (1976) and concluded that this Court approved a rule allowing error in capital sentencing as long as no mitigating circumstances were found by the trial judge. 346 So.2d at 1002-1003. What has come to be known in Florida as the "Elledge rule" thus holds that a death sentence is valid, regardless of errors in the proceedings, so long as no mitigating circumstances were found. The so called "Elledge rule" is automatically applied to almost every capital sentence reviewed by the Florida Supreme Court.

This cause thus presents the same situation as involved in Zant v. Stephens, ___U.S.___, 50 U.S.L.W. 4472 (May 3, 1982) in which this Court remanded to the Georgia Supreme Court for determination of a certified question. Also, involved in this case is, we submit, a misreading by the Florida Supreme Court in Elledge I of the plurality decision in Proffitt v. Florida, supra.

The question of the constitutionality of this automatic rule was raised in the Supreme Court of Florida by a separate point on appeal in petitioner's briefs. The Florida Supreme Court's opinion in this case does not discuss the question except to note that it reviewed all of the issues presented and found no error that "may have deprived appellant of any protections offered by the judicial process."(2a, 4a). Despite the fact that the Supreme Court of Florida expressly found, in Elledge I, that the sentencing judge had found mitigating factors to exist, 346 So.2d at 1003, in this appeal it found "no mitigating circumstances."(4a). That finding is important to review by the Supreme Court of Florida. The opinion in this case does not reveal that the Florida Supreme Court "reviewed and reweighed"

the evidence" to determine independently whether the imposition of the ultimate penalty is warranted'." Proffitt v. Florida, supra, 428 U.S. at 253. Such independent review would not be necessary under the automatic "Elledge rule" since the court found no mitigating circumstances and thus whether other errors existed would not be relevant.

Accordingly, for the reasons that this cause originated the "Elledge rule" in Florida as an automatic rule for determining harmless error in capital sentencing, that the "Elledge rule" is applied in the review of almost every capital sentence in Florida, that the "Elledge rule" is closely analogous to the rule involved in Zant v. Stephens, supra, and that in arriving at the "Elledge rule" the Florida Supreme Court misread the plurality opinion in Proffitt, review on certiorari is appropriate to resolve the important constitutional question regarding the administration of capital punishment.

CONCLUSION

The Petition for the Writ of Certiorari to the Supreme Court of Florida should be granted.

Respectfully submitted,

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BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM DUANE ELLEDGE,
Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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William Dunne ELLEDGE, Appellant,

v.

STATE of Florida, Appellee.

No. 52272.

Supreme Court of Florida.

Oct. 22, 1981.

Rehearing Denied Feb. 24, 1982.

Defendant was convicted in the Circuit Court, Broward County, M. Daniel Futch, Jr., J., on plea of guilty to first-degree murder and was sentenced to death and he appealed. The Supreme Court, 346 So.2d 998, set aside sentence and remanded cause. On remand, the Circuit Court, Broward County, M. Daniel Futch, Jr., J., resentenced defendant to death and he appealed. The Supreme Court held that: (1) lower court did not abuse its discretion in allowing defendant to appear before sentencing jury in leg irons, where defendant had confessed to murdering three persons and had threatened to attack bailiff and (2) defendant's taped confession and transcript of that confession detailing victim's threats to call police when defendant initiated rape were sufficient evidence to support conclusion that defendant killed the rape victim in order to prevent her carrying out her threat and thus constituted aggravating circumstance that the murder was committed to avoid arrest.

Affirmed.

1. Homicide ⇐354

In prosecution for murder of woman, details of another murder, for which defendant has been convicted before sentencing, were admissible to support aggravating circumstance of having previous capital or violent felony conviction, but details of third murder, for which defendant had not been convicted at the time of sentencing were not allowable, however, since at time of resentencing, defendant had been convicted of the third murder, testimony as to that murder was allowable. West's F.S.A. § 921.141(5)(b).

2. Criminal Law ⇐1166.11

Defendant's appearance before sentencing jury in leg irons was not prejudicial where defendant had confessed to murder of three persons.

3. Criminal Law ⇐637

Lower court did not abuse its discretion in allowing defendant to appear before sentencing jury in leg irons, where defendant had confessed to murdering three persons, and had threatened to attack bailiff.

4. Homicide ⇐354

Defendant's taped confession and transcript of that confession detailing victim's threats to call police when defendant initiated rape were sufficient evidence to support conclusion that defendant killed the rape victim in order to prevent her carrying out her threat and thus constituted aggravating circumstance that the murder was committed to avoid arrest. West's F.S.A. § 921.141(6)(a).

5. Criminal Law ⇐786

Trial judge did not improperly limit jury consideration of nonstatutory mitigating circumstances by giving standard jury instruction which states: "The mitigating

circumstance which you may consider, if established by the evidence, are these * * *". West's F.S.A. § 921.141(6)(a).

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender, and Jerry L. Schwarz and Richard B. Greene, Asst. Public Defenders, West Palm Beach, Florida, for appellant.

Jim Smith, Atty. Gen., and Doris E. Jenkins and Gregory C. Smith, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

This appeal is before us from a jury and judge resentencing of appellant to death, entered upon a plea of guilty. The original death sentence was vacated because of improper consideration as an aggravating factor of a collateral felony for which Elledge at the time had not been convicted. *Elledge v. State*, 346 So.2d 998 (Fla.1977) [*Elledge I*].

[1] The facts surrounding appellant's convictions for first-degree murder and rape of Margaret Anne Strack are detailed in our first review of appellant's death sentence, and do not require rehashing. It is sufficient to note that Elledge confessed to a weekend of crimes which included the rape and murder of Ms. Strack, the robbery and murder of Edward Gaffney and the robbery and murder of Kenneth Nelson. This Court vacated appellant's ensuing death penalty for the Strack murder. Although details of the Nelson murder, for which appellant had been convicted before sentencing, were admissible to support the aggravating circumstance of having a previous capital or violent felony conviction, details of the Gaffney murder, for which appellant had not been convicted at the time of sentencing, were not allowable. *Elledge I*, at 1001–02.

On this appeal appellant attacks his second death sentence on sundry grounds, all of which we have considered, but only five of which warrant discussion.

Appellant first complains that the limited testimony as to the Gaffney murder was not allowable under the literal dictates of our previous opinion in this case. *Elledge I* at 1003. But the entire thrust of our prior decision was the distinction between felony *convictions*, which were allowable to prove the corresponding aggravating factor, and a charge for such a crime which was not allowable. Our concern was that the requirements of *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), be met. *Provence* requires that a conviction is essential for consideration of prior crimes under the aggravating factor in section 921.141(5)(b), Florida Statutes (1977).[1] Yet it is clear from the record that prior to the resentencig trial, Elledge had indeed been convicted for the Gaffney murder. In *Elledge I* we made clear that evidence of convictions for certain felonies is admissible, including testimony of witnesses, "because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." *Id.* at 1001. We are at a loss to understand how appellant could claim that evidence of the Gaffney murder is forever barred despite an ensuing conviction in light of the reasoning in *Elledge I*.

[2, 3] Appellant asserts that his appearance before the sentencing jury in leg irons led to prejudice in the jury's mind. Cases which concern such prejudice deal with the adverse effects that such restraints have upon the accused's presumption of innocence. *See Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). But appellant did not stand before the sentencing jury as an innocent man; rather he stood as a confessed murderer of three persons. The critical issue in a re-

1. Section 921.141(5)(b), Florida Statutes (1977), reads: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

straint case is the degree of prejudice caused by the restraints. Here, we can find very little prejudice since the appellant was an avowed dangerous individual. *See United States ex rel. Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir.), *cert. denied*, 411 U.S. 971, 36 L.Ed.2d 694 (1973). Second such restraints are within the sound discretion of the court, and the record indicates the judge had information that the appellant had threatened to attack his bailiff. Elledge through his confessed acts had proven himself a man of his word when violence was threatened, so we would be hard pressed to find the trial court abused its discretion in taking such precautions.

[4] Appellant next asserts that an aggravating circumstance, that the murder was committed to avoid arrest, found by the judge was unsupported by the evidence. This argument is unfounded for a close examination of the record reveals that Elledge's taped confession and a transcript of that confession were admitted into evidence.[2] During this confession Elledge detailed the victim's threats to call the police when he initiated the rape. Such evidence is sufficient to support the conclusion that Elledge killed the rape victim in order to prevent her carrying out her threat.

Appellant attacks the sentencing order[3] because he claims the trial judge included under his initial finding, which stated that Elledge had a significant history of criminal activity, crimes which were either noncapital or nonviolent.[4] Such an argument is clearly obfuscatory as it is apparent that this initial finding concerned the lack of the mitigating circumstance under section 921.-

(5.) This murder was especially heinous, atrocious and cruel. The Defendant choked the victim until she was beating on the wall and gasping for air. He then threw her from the bed onto the floor and again choked her for approximately 15-20 minutes. During this period of time the Defendant was raping the victim.

After the rape and murder were completed the Defendant then dragged the body of the victim to the door of the motel room, threw her down the steps and dragged her to an automobile. The Defendant then drove her to a church parking lot and threw her from the car. The Defendant then abandoned her almost nude body, with the legs tied together by an electric cord, in the church parking lot.

Based upon these findings of fact, and based further upon the advisory sentence rendered to this Court by the twelve member jury, and it being the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court, being of the additional opinion that NO mitigating circumstances exist,

It is therefore the sentence of this Court, having already adjudged you to be guilty of Murder In The First Degree on March 17th, 1975, that you,

WILLIAM DUANE ELLEDGE, be sentenced to Death

4. Appellant seeks to characterize the initial finding as the aggravating circumstance under section 921.141(5)(b), Florida Statutes (1977), which concerns prior convictions for capital or violent felonies.

2. State's Exhibit No. 5

3. The order reads in part:

On August 3rd, 1977 the jury recommended to this Court that WILLIAM DUANE ELLEDGE be sentenced to death.

Pursuant to law, this Court makes the following findings of fact:

(1.) The Defendant does have a significant history of prior criminal activity. The Defendant has been convicted of Murder In The First Degree in Jacksonville, Florida. He has also been convicted of felonious assault in the State of Colorado. This Defendant has been confined in various institutions for a great portion of his life for various other crimes.

(2.) The Defendant did not commit this Murder while under the influence of extreme mental or emotional disturbance. The Defendant was examined by two psychiatrists and both stated that at the time of the crime the Defendant understood and could appreciate the nature and consequences of his acts. Neither Doctor found nor reported that the Defendant was acting under the influence of extreme mental or emotional disturbance at the time of the crime. There was no indication of insanity.

(3.) The victim was not a willing participant in the Defendant's conduct and did not consent to these crimes.

(4.) This murder was committed while the Defendant was raping the victim or shortly after raping the victim. The murder was committed for the purpose of avoiding arrest, as the victim had threatened to notify the police of the rape and after this threat by the victim, the Defendant committed this murder.

141(6)(a), Florida Statutes (1977),[5] because the findings that directly following the initial finding also concern lack of mitigating circumstances. The trial judge properly differentiated mitigating from aggravating circumstances in negating the statutorily described mitigating circumstance.

[5] Finally, appellant claims that the trial judge limited jury consideration of nonstatutory mitigating circumstances by giving the standard jury instruction which states: "The mitigating circumstances which you may consider, if established by the evidence, are these . . . ." We have previously considered this argument in depth and have flatly rejected it. *See Peek v. State*, 395 So.2d 492, 496-97 (Fla.1980), *cert. denied*, — U.S. —, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). *See also Dempe v. State*, 395 So.2d 501, 505 (Fla.1981).

Having found no merit in any of appellant's arguments, and having conducted a full review of the sentence which found several aggravating and no mitigating circumstances, we are unable to discern any error that may have deprived appellant of any protections offered by the judicial process. Accordingly the sentence of death is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

5. "The defendant has no significant history of prior criminal activity."

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 24, 1982

WILLIAM DUANE ELLEDGE,	**	
Appellant,	**	CASE NO. 52,272
vs.	**	Circuit Court Case No. 75-0087 CF (Broward)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

The application for stay of judgment and mandate in the event that rehearing is denied filed by attorney for appellant is granted and the proceedings in this Court and in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, are hereby stayed to and including March 26, 1982, to allow appellant to seek review in the United States Supreme Court and obtain any further stay from that Court.

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TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

cc: Hon. Robert E. Lockwood, Clerk
Hon. M. Daniel Futch, Judge

Craig S. Barnard, Esquire
Gregory C. Smith, Esquire

CHAPTER 921
SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life "[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60

days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—[illegible]

*Note.—Bracketed word inserted by the editors.

Note.—[illegible]

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CASE NO. A-814

81-6813

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT
STATE OF FLORIDA

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CASE NO. A-814

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 408 So.2d 1021 (Fla. 1982).

JURISDICTION

Respondent concedes that petitioner's statement of jurisdiction is correct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees that the issues presented by petitioner present allegations that his Fifth, Sixth, Eighth, and Fourth Amendment rights have been violated. Additionally, petitioner asserts a violation of his right to be free from being twice placed in jeopardy under the principle of Bullington v. Missouri, ____U.S.____, 68 L.Ed.2d 270 (1981).

ARGUMENT

1. Whether the Supreme Court of Florida Erred in Holding That the Substantial Rights of Petitioner Were not Violated by his Being Shackled While Being Presented for a Resentencing.

Petitioner herein has cited Estelle v. Williams, 425 U.S. 501 (1976), and has urged this Court to find that the Supreme Court of Florida has rendered an opinion which misapplies that decision. This Court held in Estelle v. Williams that an accused is entitled to the presumption of innocence during the trial and the presentation to the jury of a defendant clothed in prison attire, allows "...the possible impairment of the presumption so basic to the adversary system." Estelle v. Williams, supra, at 504.

Such is not the case presented here for several reasons. First, the petitioner is not entitled to a presumption of innocence. He has undeniably been found guilty of a capital offense. The jury has concluded, beyond a reasonable doubt, that the defendant committed the crime for which he was charged. It is elemental that the jury no longer views him as an innocent man. In Estelle v. Williams, this Court mentions the fact that under certain circumstances there would be no detriment in trying defendant in prison garb. Such would be the case if the offense was committed while defendant was in prison. The jury early is faced with evidence placing defendant in prison when the offense occurred. The Court stated: "No prejudice can result from seeing that which is already known." (Citation omitted), at p. 507.

Petitioner has stated that the Florida Supreme Court has misread Estelle v. Williams. Specifically, the claim is that petitioner is entitled to a fair trial which includes the penalty stage of the proceedings. The fatal crack in that logic is that

the protection of a fair trial does not require the presumption of innocence at the penalty phase when a jury of twelve has just returned a unanimous verdict of guilt.

The case at bar presents a slightly different case from that in which the jury immediately considers the recommendation of penalty after the finding of guilt. The cause came to the Florida Supreme Court on direct appeal, and that court determined that a second penalty phase was required. Several years after the original hearing, the petitioner came before a second jury charged with the duty of recommending a sentence to the trial court. The distinction is not without relevance because in the penalty phase immediately following a guilt/innocence phase, respondent is not faced with the possibility that the defendant's previous behavior before the trial court did not suggest the need for restraint. In the instant cause, the lapse of time, coupled with information tending to demonstrate that petitioner was a security risk, allowed the judge in the exercise of his discretion to order the leg restraints.

Beyond the fact that the presumption of innocence no longer attached at the second penalty stage, this Court has recognized that an essential state policy can be legitimately furthered by the restraints.

> The trial court made the following statements:
>
> THE COURT: We will be in recess, gentlemen, for twenty minutes. I want to put something else on the record, too, before the jury gets in here.
>
> I received information from Chief Miro yesterday, the chief of detention for the. Broward County sheriff's office.
>
> He told me he received information from two of the lieutenants -- one in the jail, and one in the detective division -- that Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my bailiff, either on the way to the courtroom or in the courtroom,

> today, because he had nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.
>
> In an abundance of precaution, I entered an order to leave Mr. Elledge in leg irons here in these proceedings.

Clearly, the trial court acted reasonably in the exercise of its discretion. More to the issue at hand, the Supreme Court of Florida did not misapply this Court's ruling in Estelle v. Williams, supra. Petitioner has demonstrated no ground for the granting of a writ of certiorari.

> 2. Whether the Consideration of Mitigating Circumstances was Precluded by the Operation of Law.

Petitioner seeks to convince this court that the trial court felt bound to consider only the statutory mitigating circumstances. He does this by citing variously: 1) the sentencing took place pre-Lockett, 2) showing that the judge found no mitigating circumstances to be present even though petitioner submitted evidence as to mitigating circumstances, and 3) by alleging that the jury was instructed to consider only the statutory mitigating circumstances.

No conclusion that the judge felt bound to the enumerated mitigating circumstances can safely be drawn from the fact that the judge found no mitigating circumstances to exist. What the judge may have done in other cases cannot be utilized to show what his state of mind was in this instance.

Petitioner compares the instant case to Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). That comparion fails. In Washington, the Fifth Circuit found that:

> Unquestionably, a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating

> and mitigating -- were the sole factors that he was permitted to consider in the discharge of his oath.

Id. at 1370. Further, the Fifth Circuit stated:

> We first note that nowhere in the trial court's charge to the jury in the sentencing phase of Washington's trial is there any explicit instruction that the jury was free to consider mitigating factors other than Washington's age and lack of a significant history of prior criminal activity.

Id. at 1369. Unlike the situation presented by Washington, the jury here was instructed on the full panoply of mitigating circumstances. There was no language limiting the consideration of mitigation. The situation herein is closer to that presented in Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The claim which was presented by Spinkelink is this:

> On the basis of language in Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), Spinkelink contends that § 921.141 impermissibly limits the mitigating factors which the judge and jury can consider in assessing the death penalty, and therefore must be declared unconstitutional. We disagree.

Id. at 670.

The court disposed of the claim by citing Proffitt v. Florida, 428 U.S. 242 (1976). In Proffitt, this Court found that § 921.141, F.S., passed constitutional muster. Additionally, this Court stated that the statute contained no limiting language with respect to mitigating circumstances. In Lockett v. Ohio, 438 U.S. 586 (1978), this Court reaffirmed the constitutionality of the statute:

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive.

Id. at 606. * * * * *

> None of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

Id. at 607. This Court found that the Ohio statute was -- signifigantly different and therefore must fail. The instruction found in the trial court herein is not different from that found in Spinkelink.

> 3. Whether Double Jeopardy Attaches to Prevent Certain Aggravating Circumstances to be Found After, on Direct Appeal, the Previous Sentencing Proceedings are Found Infirm.

Petitioner urges this Court to grant certiorari on the ground that Bullington v. Missouri, ____U.S._____, 101 S.Ct. 1852 (1981), mandates that the double jeopardy protections prevent the use of an aggravating circumstance earlier found by the Florida Supreme Court to be unproven. The factual situation is this: the first sentence was based in part on the fact that petitioner had been charged with, and confessed to the murder of a security guard, one Gaffney. On direct appeal, the Florida Supreme Court found that the admission of petitioner's confession concerning the Gaffney murder was improper because petitioner had not been convicted of that murder. During the second penalty phase, evidence of the Gaffney conviction was introduced. Petitioner now claims that the attempt to demonstrate the aggravating factor of the Gaffney murder in the first trial bars, on double jeopardy grounds, the introduction of that crime at the second proceeding.

Bullington does not apply to this cause for two reasons. The first of these is that the statutes of Missouri and Florida are very different concerning the role of the jury in capital sentencing. The Florida statute approved by this court in Proffitt v. Florida, 428 U.S. 242 (1976), provides that

sentencing be done by the trial court after receiving the advisory sentence from the jury. The Missouri statute provides that if either the judge or the jury does not recommend the extreme penalty, then defendant is to be sentenced to life imprisonment. The net effect is that a recommendation of life from the jury is an absolute bar to the imposition of the death penalty by the judge in Missouri.

This Court has approved of the Florida sentencing structure which allows a judge to impose the death penalty after a jury has recommended life imprisonment. This Court stated in Proffitt:

> ...in Florida the sentence is determined by the trial judge rather than by the jury. This court has pointed out that jury sentencing in a capital case can perform an important societal function, (citations omitted), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Id. at 252.

In Bullington, this Court likens the presentencing hearing to a trial. The State of Missouri was required to prove certain facts beyond a reasonable doubt. The state of Missouri failed in that burden and the jury found that life imprisonment was warranted. This recommendation was binding on the trial judge and was a sentence rendered by the jury. This brings up the second distinction between Bullington and the case at bar--the fact that in Bullington, defendant was sentenced to life. In the instant case, the first sentencing proceeding resulted in a sentence of death for Elledge. No harsher sentence was received in the second proceeding herein.

It is the introduction of a portion of the state's proof that is the claimed double jeopardy infraction. But did the reversal of the sentence by the Florida Supreme Court on the ground that the proof was improperly presented, act as an acquittal of the sentence of death? It is preposterous to suggest that the answer to that question is affirmative. Instead, the Florida Supreme Court mandated a new sentencing proceeding, which allowed the state to present all proffered evidence relevant to proof of the aggravating circumstance. The next question is whether these elements of evidence of aggravating circumstances are tantamount to individual criminal charges. In Bullington, this Court succinctly states: "...the double jeopardy clause forbids retrial of a defendant who has been acquitted of the crime charged." Id. at 278. Clearly, the Florida Supreme Court was not finding that the state had failed to sufficiently prove a crime charged in determining that evidence of the Gaffney murder could not be utilized because it was outside the statutory mandates.

It is therefore clear that the petitioner has failed to demonstrate that Bullington has relevance to this case. The result further is that petitioner has failed to demonstrate that this Court should be grant certiorari on this issue.

4. Whether the Jury was Precluded from Hearing Evidence Concerning the Applicability of the Death Penalty.

Petitioner complains that he was prevented from adducing testimony at the penalty phase which was relevant to the nature and effect of the penalty of death.

In the portions of the transcript contained within petitioner's brief in support of the issuance of a writ of certiorari to the Supreme Court of Florida, petitioner has clearly shown that the evidence had no relation or relevance to

the crime charged or the character of the accused. As such, the testimony was irrelevant and the judge properly refused its admission.

In Lockett v. Ohio, 438 U.S. 506 (1978), this Court held:

> ...that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating facter, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for sentence less than death. [Emphasis in original.]

Id. at 604

It, therefore, appears that evidence not concerning defendant's character or any circumstance of the offense is outside that properly adduced for the purpose of mitigation.

In fact, petitioner sought to argue that the death penalty was improper, not that it was improper as applied to the instant cause. Clearly, the forum for that is a legislative one. The analogous situation would be the presentation of evidence that convicting a person for robbery does not tend to lower the incidence of robbery. The relevance is not even tenuous, it is simply nonexistent.

> 5. Whether the Rule Announced by the Florida Supreme Court in Elledge v. State, 346 So.2d 998 (Fla. 1977), Announces a "Automatic Harmless Error Rule"

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Supreme Court of Florida stated that had the trial judge found no mitigating circumstances, then even if there had been consideration of a nonstatutory aggravating circumstance, the existence of some statutory aggravating circumstance would allow his death sentence to stand. The logic he uses is this: the judge must weigh aggravating against any mitigating he may

find. If he specifically finds no mitigating circumstances, then as long as one proper aggravating circumstance exists, then the balance must always tip toward the death sentence. In Elledge, the trial court stated, "...insufficient mitigating circumstances exist to outweigh the aggravating circumstances...." Id. at 1003.

The Florida Supreme Court concluded in Elledge that the trial court implicitly found some mitigating circumstances to weigh against the aggravating, and as a result a new penalty phase was necessary. In Brown v. State, 381 So.2d 690 (Fla. 1980), the Florida Supreme Court stated:

> Although improper aggravating circumstances (factors enumerated one and two) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless Elledge v. State, 346 So.2d 998 (Fla. 1977), does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d, at 1003. The trial judge has told us in his order that appellant's age, twenty-two years at the time of the offense and twenty-three years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances.

Id. at 696.

Thus, the characterization of the Elledge precedent as an automatic harmless error rule is mistaken. In fact, if the Florida Supreme Court did not recognize the distinction between the cases with mitigating circumstances, and those without, the principles of Furman v. Georgia, 408 U.S. 238 (1972), would be violated. If life imprisonment can be imposed in a situation in which the trial court specifically found no mitigating

circumstances, but found an aggravating circumstance, then such a sentence would be open to the accusation that the sentencing was "wantonly" or "freakishly" imposed. Thus, a specific finding of no mitigating circumstances, along with a specific finding of a statutory aggravating circumstance, presumes that the death penalty is appropriate. This is the analysis made by the Florida Supreme Court. When no mitigating circumstance is weighed against any proper aggravating circumstance, obviously the death sentence is supported.

Petitioner claims that Zant v. Stephens, _____U.S. _____, 50 U.S.L.W. 4472 (May 3, 1982), presents the same issue herein. This is obviously not the case since in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), it is clear that the trial court told the jurors that they could recommend life without enumerating the mitigating circumstances they found.

> The clear implication of the charge that the jury could recommend mercy without stating what mitigating or aggravating circumstances they found to be present is that aggravating circumstances could be present and yet the jury could still be free to impose life imprisonment.

Id. at 405. Thus, to recommend life, the jurors could have simply made the statement that aggravating circumstances did not outweigh mitigating. Clearly, one cannot know what the weighing process would have been without the improper aggravating circumstance in Stephens. That is diametrically opposed to the specific finding herein that no mitigating circumstances were present. Clearly, petitioner has not demonstrated that this Court should grant certiorari to review the decision of the Florida Supreme Court.

Recently, this Court found that Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), should be remanded to the Eleventh Circuit for reconsideration in light of Engle v. Isaac,

U.S.___ (1982), 31 CrL 3001. The question of whether the appellate court could "know" the effect of the elimination of an aggravating circumstance from the juries' consideration was discussed. It seems that this Court has decided the issue against petitioner.

CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief for Respondent in Opposition to Mr. Craig S. Barnard, Chief Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, by U.S. Mail, this 25th day of June 1982.

George R. Georgieff
GEORGE R. GEORGIEFF
Assistant Attorney General

of Counsel

CASE NO. A-814

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

SUPPLEMENTAL BRIEF OF RESPONDENT

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ARGUMENT

ISSUE

WHETHER THE FLORIDA SUPREME COURT PROPERLY UPHELD THE IMPOSITION OF THE DEATH PENALTY IN THE FACE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE.

Respondent, the State of Florida, earlier supplied this Court with a brief in opposition to petitioner's prayer for certiorari relief. The State of Florida now believes that petitioner's issue does present a substantial federal question in that the Florida Supreme Court, on numerous occasions, has held that the presence of an improper aggravating circumstance in sentencing does not necessarily cause a violation of the constitutional rights of the defendant. The Circuit Court of Appeals, Eleventh Circuit, recently dealt with the following issue in Proffitt v. Wainwright, ___F.2d____(11th Cir. 1982), (No. 80-5997, decided September 10, 1982)"

> whether the construction of the eighth statutory aggravating factor [whether murder was committed in a heinous atrocious and cruel manner] evinced by the trial court's application of it to the facts of this case comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards.

Slip op. at 2733.

The Eleventh Circuit substituted its judgment for that of the trial judge and determined that the eighth statutory

aggravating circumstance - heinous, atrocious, or cruel - was not present. Further, the court held that the use of a non-statutory aggravating circumstance--appellant has the propensity to commit the crime for which he was convicted and is a danger and menace to society--to be constitutionally impermissible.

Notwithstanding this Court's specific holding in Proffitt v. Florida, 428 U.S. 242 (1976), that non-statutory aggravating factors do not necessarily make the sentence unconstitutional, the Eleventh Circuit held:

> In considering appellant's "propensity to commit [murder]" and the danger he posed to society, the trial court transcended the list of aggravating factors set forth in the Florida statute and substituted its own judgment of what circumstances justified capital punishment for that of the Florida Legislature. In so doing, the trial judge not only committed error under the state law, see Brown v. State, 381 So.2d 690, 696 (Fla. 1980); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); he also exceeded the federal constitutional limitations imposed by Furman on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner.

This must be viewed as nothing less than an outright repudiation of this Court's holding in Proffitt v. Florida, supra. The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has a propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly,

> through his intentional act created a great risk of serious bodily harm and death to many persons.

At 246. This is particularly interesting because of the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute [§ 921.141, F.S. (1975)]. See Proffitt, 428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The unmistakable conclusion is that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty. This is diametrically opposed to the holding of the Eleventh Circuit in Proffitt v. Wainwright, supra.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court was confronted with a situation where it was necessary to determine whether the use of a nonstatutory aggravating circumstance was constitutionally permissible. The court then engaged in an exhaustive analysis of Proffitt v. Florida, concluding as follows:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating circumstances where are are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the

> mitigating circumstances in the weighing process which is dictated by our statute. [Emphasis ours.]

Elledge at 1002, 1003. Consequently, under the reasoned analysis of Proffitt by the Florida Supreme Court, the existence of the statutory aggravating circumstance and the absence of mitigating circumstances renders unimportant the existence of nonstatutory aggravating circumstances. In petitioner's trial, the trial judge found that there were no mitigating circumstances. Thus, the Eleventh Circuit's decision in Proffitt v. Wainwright, supra, not only is contrary to the law of Florida, but is also contrary to this Court's holding in Proffitt.

As recently as July 15, 1982, the Florida Supreme Court in Ferguson v. State, 417 So.2d 639 (Fla. 1982), reaffirmed the principle that nonstatutory aggravating circumstances do not necessarily invalidate the sentence when no mitigating circumstances are found.

> Our negation of two of the aggravating circumstances found by the trial court would not change the result of this case in the absence of mitigating circumstances for there remain four valid aggravating circumstances. In such cases, reversal of the death sentence would not necessarily be required, as any error that occurred in the consideration of the two inapplicable aggravating circumstances was harmless. See Shriner v. State, 386 So.2d 525 (Fla. 1980), cert.denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 289 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912, 101 S.Ct. 300, 64 L.Ed.2d 862 (1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176

(1979); and Elledge v. State, 346 So.2d 998 (Fla. 1977).

At 646.

This issue should be decided by this Court. The courts of the State of Florida, relying on this Court's decision in Proffitt v. Florida, supra, are in direct conflict with the above cited decision of the Eleventh Circuit. The 9,000,000 citizens of Florida have the right to know which precedent is controlling. The failure to resolve this intolerable conflict will cause a significant number of cases to be upheld under the Florida standard, only to be reversed in the federal system.

CONCLUSION

Therefore, respondent feels that a substantial federal question has been presented by petitioner and therefore certiorari review should be granted by this Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Supplemental Brief to Mr. Craig Barnard, Assistant Public Defender, 224 Datura, Harvey Building, 13th Floor, West Palm Beach, Florida 33401, by U.S. Mail, this 24th day of September, 1982.

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CASE NO. ~~A-814~~

41-6813

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUPREME COURT, U.S.

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

COMES now respondent, the State of Florida, by and through the undersigned counsel, and hereby respectfully requests leave to file a supplemental brief of respondent. In support of said motion, the State of Florida would show:

I.

Respondent earlier filed Brief in Opposition to petitioner's prayer for writ of certiorari. Among the points presented by petitioner in support of his prayer for relief was the allegation that nonstatutory aggravating factors were

considered in the imposition of his sentence of death. The State of Florida responded to that allegation stating that a substantial federal question was not presented for several reasons.

II.

Recent developments in the Eleventh Circuit, specifically the decision of Proffitt v. Wainwright, No. 80-5977, _____F.2d_____(11th Cir. 1982), have changed the status of respondent's position in this cause. In Proffitt v. Wainwright, a rule disallowing the use of nonstatutory aggravating circumstances under any factual setting is announced. That holding is directly in opposition to the rule announced by the Florida Supreme Court in Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1977); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Sireci v. State, 399 So.2d 964 (Fla. 1981).

III.

Direct conflict in the decisional law between the highest court of a state and any of the circuit courts of appeals provides a valid reason for the issuance of a writ of certiorari by this Court.

WHEREFORE, it appears that a substantial change has occurred in the position earlier taken by the State of Florida in the above-styled cause on the issue of the existence

of a substantial federal question. It is respondent's position that the writ should issue for the purpose of determining the validity of the use of nonstatutory aggravating circumstances previously approved by this Court in Proffitt v. Florida, 428 U.S. 506 (1976). It is for this reason that respondent requests leave to file a supplemental brief.

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I HEREBY CERTIFY that I have furnished a copy of the foregoing Motion to Mr. Craig Barnard, Assistant Public Defender, 224 Datura, Harvey Bldg., 13th Floor, West Palm Beach, Florida 33401, by U.S. Mail, this 24th day of September 1982.

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